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IN THE SUPREME COURT

Of The

United States

October Term, 1982

MICHAEL WARREN COLETTA, JOHN A. WILMS, HERVE BITTON, HERNAN CASTRO

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether white males have standing to challenge discrimination in the selection of grand jury foremen in federal criminal trials?

2. Whether a federal criminal indictment must be dismissed where uncontradicted evidence shows that the Administrator of the DEA has improperly refused to reclassify cocaine into a different schedule of the Controlled Substances Act?

3. Whether a warrantless search and seizure conducted under the "incident to arrest" exception to the Fourth Amendment's warrant requirement must be contemporaneous with that arrest?

PARTIES TO THE PROCEEDINGS BELOW

There were no parties, other than petitioners, in the Court of Appeals.

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Nelson, Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830 (1975) 24,25

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OTHER AUTHORITIES

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PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals
for the Ninth Circuit

The petitioners, Michael Warren Coletta, John A. Wilms, Herve Bitton, and Hernan Castro, respectfully pray that a writ of certiorari be issued to review the opinion of the United States Court of Appeals for the Ninth Circuit entered on July 29, 1982 (Petition For Rehearing denied September 2, 1982).

OPINIONS BELOW

The District Court issued no opinion nor oral findings of fact nor conclusions of law in denying defendants' motion to dismiss the Indictment, nor defendant Coletta's motion to suppress evidence. The opinion of the Court of Appeals now reported at 682 F.2d 820 (1982), appears as Appendix A. The Order of the Court of Appeals dated September 2, 1982, denying the Petition for Rehearing appears as Appendix B.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was entered on July 29, 1982. Petitioners timely petition for rehearing was denied on September 2, 1982. Jurisdiction of this Court is conferred by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article III, Section 2 of the

United States Constitution provides in pertinent part:

> "The Judicial power [of the United States] shall extend to all Cases, in Law, and Equity, arising under this constitution [and] the laws of the United States ...
>
> "...
>
> "The Trial of all Crimes ... shall be by jury ..."

The Fifth Amendment to the United States Constitution provides in relevant part:

> "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ... nor shall any person ... be deprived of life, liberty, or property, without due process of law ...."

The Sixth Amendment to the United States Constitution provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury ..."

Various sections of the Jury Selection and Service Act of 1968 (28

U.S.C. §1861 et seq) apply to the grand jury foremen selection issue raised by this Petition. In particular, §1861 provides, in relevant part, that it shall be

> "The policy of the United States that all litigants in federal courts entitled to trial by jury shall have the right to grand and petit jurors selected at random from a fair cross-section of the community .... All citizens shall have the same opportunity to be considered for service on grand and petit juries ...."

28 U.S.C. §1862 provides that:

> "No citizen shall be excluded from service as a grand or petit juror in the District Court of the United States on account of race, color, religion, sex, national origin or economic status."

Various sections of the Controlled Substances Act (hereafter the "CSA") are necessarily involved in this action. The particular provisions most directly involved, which are set out in full in Appendix C, are portions of 21 U.S.C. §§811, 812, 841, and 877.

STATEMENT

1. On May 8, 1981, the federal grand jury for the Northern District of California indicted petitioners[1/] for conspiring to distribute cocaine in violation of Title 21 U.S.C. §846; in addition, petitioner Coletta was accused of possessing cocaine for distribution in violation of 21 U.S.C. §841(a)(1). Prior to trial, petitioners challenged the indictment returned against them on several grounds, including the two presented here: first, that the selection of grand jury foremen by district judges in the Northern District of California violated the Jury Selection Act by the protections of the Fifth Amendment in that Caucasian males accounted for 25 of the 28 of the grand juries empaneled from

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1/ A fifth individual, CARLOS CASTRO, was indicted and convicted along with petitioners, but did not challenge his conviction on appeal.

January 5, 1977, to June of 1981 (of the remaining three, only two were women and one might have been Hispanic; no black or Asian was ever selected). Second, that developments in the state of scientific and medical knowledge since the enactment of the CSA in 1970 had rendered the original classification of cocaine in Schedule II of that Act invalid. Further in light of equally significant development in the procedural and substantive law applying to Administrative actions, the refusal of the Administrator of the DEA to carry out his statutorily mandated duty to reclassify controlled substances in such circumstances denied petitioners due process of law, and, for the reasons set out more fully below, rendered the Indictment invalid.

In addition, defendant Coletta moved to suppress the warrantless search and seizure of a travel bag removed from

the stationery car in which he was sitting at the time of his arrest, but not opened and searched and until the drug agents returned to their office, substantially later in time and removed in place from the place of arrest.

2. Because all the defendants were white males, the District Court determined, without oral or written conclusions of law or citation of authority, that they did not have standing to raise the question of alleged discrimination in the selection of the grand jury foreman. Accordingly, their motion challenging the Indictment on this ground was denied.

3. Finally, defendants made an extensive Offer of Proof which, briefly stated, alleged that scientific and medical evidence developed since the Congress placed cocaine in Schedule II (in 1970) rendered cocaine's continued classification in Schedule II invalid under

each of the criteria set out in 21 U.S.C. §812. Although the government never contested any of the substantive allegations contained in defendants' Offer of Proof, and although defendants stressed at the outset that they were challenging neither the validity of the Congressional placement of cocaine in Schedule II nor the constitutionality of the delegation of the power to reclassify to the Administrator, the Court denied the defendants' motion without comment.

4. With respect to the seizure of cocaine from the travel bag, the facts which were not in dispute at the suppression hearing showed that pursuant to a pre-arranged plan, defendant Coletta and an undercover informant posing as the purchaser of drugs were sitting in Coletta's car parked in a supermarket parking lot, with a partially opened travel bag sitting in the back seat. Also by prior arrangement, when the DEA

officer approached the car and was signaled by the informant that the transaction had occurred, the agent immediately placed Coletta under arrest and removed him from the car. Once Coletta was removed from the car and handcuffed and taken out of harm's way, the agent removed both his travel bag as well as the informant's bag from the car. Instead of searching Coletta's bag at the scene, the agent closed it and took it to his office where, sometime later, he reopened it and removed the bags containing the cocaine from its interior.

BASIS FOR FEDERAL JURISDICTION

Because this is a federal criminal prosecution, 18 U.S.C. § 3231 conferred original jurisdiction on the district court.

REASONS FOR GRANTING THE WRIT

1. The Ruling By The Court Of Appeals That White Males Lack Standing To Challenge Discriminatory Process For

The Selection Of Grand Jury Foremen Requires This Court To Settle A Conflict Between Circuits, And To Resolve An Important And Undecided Question Of Federal Law.

Although this Court has decided six major cases dealing with the question of alleged discrimination in the selection of grand and petit juries since 1972, [2/] the precise question here has never been decided: may white males challenge an Indictment returned by grand juries, the foremen of which were selected in a manner which discriminated against minorities, including blacks, Asians, Mexican-Americans, and women? Language in this Court's opinions points in different directions. In Peters, supra, the Court held that the existence of constitutional violations in the grand

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[2/] See Alexander v. Louisiana, 405 U.S. 625 (1972); Peters v. Kiff, 407 U.S. 493 (1972); Taylor v. Louisiana, 419 U.S. 522 (1975); Castaneda v. Partida, 430 U.S. 482 (1977); Duren v. Missouri, 439 U.S. 357 (1979); Rose v. Mitchell, 443 U.S. 545 (1979).

jury selection process "does not depend on the circumstances of the person making the claim." 407 U.S. at 498. In Castaneda, however, the Court employed language suggesting that a defendant objecting to the jury selection process must show "underrepresentation of his race or of the identifiable group to which he belongs." 430 U.S. at 494. Finally, in Rose v. Mitchell, the Court pointed in both directions at the same time. First, the Court repeated the language of Peters that it "has recognized that a criminal defendant's right to equal protection of the laws has been denied when he is indicted by a grand jury from which members of a racial group purposely have been excluded." 443 U.S. at 556. Later in that same opinion, the Court repeated the Castaneda language, emphasizing the need of a defendant to belong to the class being discriminated against.

Thus far, two Courts of Appeals have passed on the question presented here. In United States v. Perez-Hernandez, 672 F.2d 1380 (1982), the Court of Appeals for the Eleventh Circuit concluded that the apparent conflict in the language just cited does nothing to undercut the "clear and unambiguous" holding in Peters that "has never been expressly overruled," especially since the language in Rose was dicta by virtue of the fact that the petitioners there were black and were challenging discrimination against their own race. 672 F.2d at 1386. In the instant case, the Ninth Circuit, with only passing reference to Perez-Hernandez, reached exactly the opposite conclusion. This conflict, regarding a crucial question of constitutional criminal law, requires resolution by this Court.

Petitioners suggest that the Ninth Circuit erred in distinguishing the two different facets of the law of standing which have been fashioned by the federal courts to deal with important questions emanating from the limited powers and jurisdiction conferred on such courts by the constitution. See Barows v. Jackson, 346 U.S. 249, 255-256 (1953); Warth v. Seldin, 422 U.S. 490 (1975); and Sedler, "Standing To Assert Constitutional Jus Tertii In The Supreme Court," 71 Yale L.Rev. 599 (1962). Briefly stated, the Court of Appeals confused constitutional standing, which derives from the requirement of Article III that an actual "case for controversy" be presented for decision, with the "judicial limitations" which the federal courts have imposed upon themselves as to how they will exercise constitutional jurisdiction which they in fact possess.

That is, the Court of Appeals confused the standing of a party to bring a suit with the standing of a party to a suit already brought to contest the action against him on particular grounds. See Sedler, supra, at 599. Indeed, all of the "equal protection cases" which preclude members of a class not subject to discrimination from seeking -- as plaintiffs -- to enforce rights of the class being discriminated against are totally inapplicable to the inquiry here. As the Eleventh Circuit correctly concluded, no compelling reasons exist for the federal courts to limit the ambit of their inquiry into allegations of discriminatory selection of grand or petit juries, or their officers. Accordingly, this Court should grant certiorari, reverse the rulings below, and order that an evidentiary hearing be held to determine whether or not the prosecution can rebut the strong

prima facie case of discriminatory selection established by petitioners below.

2. Given Uncontradicted Evidence That Scientific Developments Require Reclassification Of Cocaine Under The Terms Of The CSA, The District Court's Denial, Without Hearing, Of The Motion To Dismiss The Indictment Violated Rights Guaranteed By The Due Process And Indictment Clauses Of The Fifth Amendment As Well As The Fair Trial Guarantee Of The Sixth Amendment.

A. Two points must be made prior to discussion of the issue presented in petitioners' misclassification attack on the Indictment. First, contrary to statements made in the Ninth Circuit opinion, petitioners did not challenge the constitutionality of the CSA, the original placement of cocaine in Schedule II by the Congress, nor the delegation of the power (and the duty) to reclassify drugs as scientific knowledge can prove to the DEA Administrator. Indeed, petitioners contend that the unbroken chain of cases upholding the validity of the

Act, and the original classification not only supports their view that the Administrator has acted improperly in not reclassifying, but indeed, virtually compels that very conclusion. See NORML v. DEA, 559 F.2d 735 (D.C. Cir. 1977); United States v. Kiffer, 477 F.2d 347 (2nd Cir. 1973); United States v. Castro, 401 F.Supp. 120 (N.D. Ill. 1975).

Second, and again contrary to statements made in the Ninth Circuit opinion, defendants' Offer of Proof specifically alleged the scientific evidence would show that under each and every criteria of §812, particularly including effects on the public health and the potential of a drug for abuse, cocaine may not properly be retained in Schedule II. To understand why this is so, a brief overview of the structure and purpose of the Act is necessary.

Most important to note is that the CSA was designed to deal in a

coordinated fashion with a perceived drug problem in the United States by establishing rehabilitation programs relating to drug abuse (Title 1); by providing authority for the Department of Justice with respect to law enforcement aspects of drug abuse (Title 2); and by regulating the importation and exportation of drugs subject to abuse (Title 3). See 1970 U.S. Code Cong. & Ad. News, p. 4568.

Central to the Act was the regime by which substances could be added, removed, or reclassified within controlled substance "schedules." The CSA contains five categories of controlled substances, designated as Schedules I-V, and the schedules are ranked on the basis decreasing harmfulness at each level, measured against increasing benefits for the user. See 21 U.S.C. §812(b) (1-5), infra, Appendix C. And see, e.g., NORML v. DEA, 559 F.2d 735, 737 (D.C. Cir. 1977). Moreover, the regulatory controls

and criminal penalties imposed on the manufacture, acquisition, and distribution of substances listed under the CSA vary enormously in proportion to the schedule in which the drug is placed.

Congress recognized that as scientific knowledge concerning the effects of various controlled substances improves, the initial drug classifications in the Act would have to be changed. Accordingly, it gave the Attorney General the power to change the schedules of controlled substances (see 21 U.S.C. §811, infra, Appendix C). In order to assist the Attorney General in this task, the Congress authorized him to carry out educational and research programs to develop the information necessary to perform his rescheduling functions under Section 811 [see 21 U.S.C. §872(a)(6)], and provided guidelines to him for use in determining into which schedule a controlled substance should be

placed. See 21 U.S.C. §811(c), infra, Appendix C, for a listing of the eight factors to be considered in determining the control decision.

The legislative history of the CSA, and particularly the testimony of then-Attorney General Mitchell and then-director of the Bureau of Narcotics and Dangerous Drugs (BNDD) Ingersoll, make clear that the theory and structure of the Controlled Substances Act was guided by three overriding principles: first, the creation of five tiers of controls (codified in the five schedules of 21 U.S.C. §812) was designed to insure both actual fairness (in the sense that offenses and offenders of varying degrees of severity would be dealt with by means of graduated penalties) and the appearance of fairness (in the sense that judges, prosecutors, and the public would perceive that the penalty fits the crime in as many senses of that word as are

are possible). Second, the stress upon scientific criteria and constant updating and republishing of the schedules are designed to insure that the classification and penalty structure was rational and credible, in the sense that the classification of drugs into one or more of the various schedules conformed to the best available scientific knowledge as to the relative harmfulness and benefit of such substance. Third, and in the eyes of the sponsors of the legislation, the most important feature of the CSA, was the granting of discretion to the Attorney General to move drugs between one schedule or another. (Section 811; the statute provides that the Attorney General shall add or move a drug from the Schedules if he determines that certain factors are present but merely may transfer drugs from one schedule to another in light of new evidence.)

As Mr. Ingersoll explained

in his testimony introducing the Controlled Substances Act:

> "Perhaps the greatest advantage to this approach is that drugs may be moved from one schedule to another as scientific information and law enforcement problems come to light ... by giving the Attorney General this discretion, the Congress will permit a quick response to the ever-changing drug problem based upon relative harm and relative abuse potential of existing drugs and newly discovered drugs."
>
> Testimony of John Ingersoll at the Hearing of the Subcommittee to Investigate Juvenile Delinquency on the Committee of the Judiciary, September 15, 1969, at p. 214.

If petitioner's contention is correct (that the "imposing corrective mechanism"[3/] of the CSA is central both to its validity as legislation and to the

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3/ See United States v. Kiffer, supra, 477 F.2d at 357; United States v. Castro, supra, 401 F.Supp. at 27, for lucid analyses sustaining drug classifications against "minimum rationality" challenges precisely because the Congress provided a means to change classifications as knowledge about drugs improves.

validity of the manner in which it is implemented), the question presented by the district court's refusal to entertain his challenge to the administration of the Act boils down to this: May a defendant in a criminal case be prevented from challenging the Administrator's failure to reclassify a controlled substance as part of his defense to the charges against him? Petitioner submits that the answer must be no, because the rights to due process of law and fair trial guaranteed by the Fifth and Sixth Amendments, and the Cases and Controversies provision of Article III of the Constitution,[4/] preclude the imposition of the criminal sanction --

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[4/] See the celebrated "Dialogue" of Henry M. Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," 66 Harv.L.Rev. 1632, and reprinted in Hart & Wechsler, The Federal Courts And The Federal System (2nd ed. 1973), Page 330. See also Tribe, American Constitutional Law (1978), at Pages 37 and following.

indeed, preclude even the exercise of jurisdiction -- unless two conditions are met: First, the legislature must have prescribed a definite penalty (just as it must have proscribed clearly defined conduct); second, the defendant must be permitted to place in issue every element necessary to prove his guilt.

B. Petitioner argued below that a determination by the trial court that the current classification of cocaine is improper would require dismissal of the indictment, because the proper classification would then be uncertain; since this classification in turn determines the range of penalty which may be imposed by the court, prosecution under 21 U.S.C. § 841(b)(1)(A) would violate the fundamental principle of Anglo-American criminal law: nulla poena sin lege -- no

punishment without law.[5/]

> "[A] crime is made up of two parts, forbidden conduct and a prescribed penalty. The former without the latter is no crime."
>
> LaFave and Scott, Criminal Law (1972), p. 8; See also H. Packer, The Limits of the Criminal Sanction (1968), p. 19; J. Hall, General Principles of Criminal Law (2d ed. 1960), P. 18; R. Perkins, Perkins on Criminal Law (2nd ed. 1969), Pp. 8-9.

The reason, indeed the necessity, for the rule that where the penalty is uncertain, no prosecution may be had, is a product of the reaction of colonial America to the excesses and oppressions effected by the King's judges during the Seventeenth and early Eighteenth Centuries. See Nelson, Americanization of the Common Law: The Impact of Legal

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[5/] This principle descends directly from the Magna Carta: "No freeman shall be taken, or imprisoned, or disseised [dispossessed] or outlawed, or exiled, or anywise destroyed; not shall we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land." Magna Carta, Clause 39 (12 Am.Jur., Constitutional Law, Section 568, p. 261).

Change on Massachusetts Society, 1760-1830 (1975); Horwitz, The Transformation of American Law, 1780-1860 (1977), particularly pp. 1-10. The experience of colonial Americans was that the General Courts, which served as the principal link between the provincial governments and local communities, and which combined vast coercive powers covering criminal, administrative, and civil jurisdictions, posed too great a threat to liberty to be retained in the new republic. Accordingly, the Americans came to agree that,

> "Those who "executed the Law ought not to enquire into .... its Reason and Policy" but ought merely "to enquire what is Law, and see that Laws are informed," for to permit courts to determine policy would introduce "a Union of Legislative and Executive Power" -- "the worst Sort of Tyranny" .... Colonial Americans, in sum, wanted to be ruled by fixed law, not powers that could be used by potentially arbitrary rulers.
>
> Nelson, supra, at p. 18, quoting Josiah Quincy, "Charge to the Grand Jury, "Reports of

Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, Between 1761 and 1772, (1865).

That is, a momentous and far-reaching war was waged in and around the political institutions of post-independence America, in which the point of controversy was the extent to which the common law of England should be "received" into our substantive and procedure law -- indeed into the very framework of our judicial and political institutions. Perhaps by accident, perhaps not, the reception controversy came to a head in United States v. Hudson & Goodwin, 7 Cranch 32, 3 L.Ed. 259 (1812):

> "The constitutional objection to common law crimes boiled down to the assertion that if the federal judiciary possessed jurisdiction to impose criminal sanctions without a statute it would be able to obliterate all constitutional limitations on the federal government. If the principle were to prevail, Thomas Jefferson wrote in 1800,

> "of a common law being in force in the United States" it would "possess .... the general government at once of all the powers of the State Governments and reduce .... us to a single consolidated government."

Horwitz, supra, p. 10.

In Hudson & Goodwin, the defendants had been convicted of libeling the President and the Congress by publishing an article in a Connecticut newspaper accusing the Chief Executive and the entire membership of attempting to bribe Napoleon Bonaparte (with a two million dollar "present") to make a treaty with Spain. In upholding a demurrer to the indictment, the Supreme Court stated:

> "The only question which this case presents is, whether the Circuit Courts of the United States can exercise a common law jurisdiction in criminal cases .... Although this question is brought up now for the first time to be decided by this court, we consider it as having been long settled in public opinion .... The only ground on which it has ever been contended that [the jurisdiction of the federal courts to define crimes or punishments] could be maintained is, that, upon the

> formation of any political body, an implied power to preserve its own existence and promote the end and object of its creation, necessarily results to it .... But .... if [this argument] may communicate certain implied powers to the general government, it would not follow that the courts of that government are vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense.
>
> 7 Cranch, at pp. 32-34 (emphasis added).

Over 100 years later, the Court of Appeals for the Second Circuit dismissed an indictment brought under a provision of the National Defense Act (chapter 53, 40 Stat. 276, August 10, 1917) which made it "unlawful" to hoard sugar or other "necessaries" which were in short supply during World War I. Mossew v. United States, 266 F. 18 (2nd Cir. 1920). The statute in question,

however, specified no punishment, and the court, relying on Hudson & Goodwin, held that "By failure to provide a penalty for infraction of this statute, or to prescribe a punishment, the statute does not denounce the act as criminal." Id. at 22.

More recently, this Court took up the punishment dimension of federal criminal jurisdiction in a setting more similar to that presented here -- that is, where Congress clearly intended to criminalize conduct and provide a penalty therefor, but where, for some reason, the applicable penalty is later seen to be uncertain. In United States v. Evans, 333 U.S. 483 (1948), the Court upheld the dismissal of indictments brought under the Immigration Act of 1907, as amended in 1917 (34 Stat. 900, 1907, 39 Stat. 880, 1917, 8 U.S.C. Section 144). An "unusual and difficult problem in statutory construction" arose because the amendment adding "harboring and

concealing" left it unclear whether the punishment (one year) and penalty ($2,000) provisions could apply to each separate act. As the Court described its dilemma:

> "The choice, as might appear on glancing at the statute, is not simply between no penalty, at the one extreme, and, at the other, fine plus imprisonment up to the specified maxima for each alien concealed or harbored. The problem is rather one of multiple choice, presenting at least three, and perhaps four, possible yet inconsistent answers ....
>
> 333 U.S. at 484 (emphasis added).

After noting that "every reasonable presumption attaches to ...." require the courts to effectuate the Congressional purpose, the court held that "there are limits beyond which we cannot go . . ." Id. Again noting Hudson & Goodwin, it reaffirmed the principle that where the penalty attached to proscribed conduct is uncertain, criminal jurisdiction does not lie.

Although the uncertainty of penalty in the statutory setting at issue here arises in a different manner than it did in Evans, the resulting problem is exactly the same: once the present classification has been invalidated, it lies beyond the power of this Court to re-classify cocaine into Schedule III, IV, or V. Consequently, since the possible penalty for any violation turns on such reclassification, the problem is also "one of multiple choice, presenting at least three ... possible yet inconsistent answers ... ." Id.

Finally, if one of the two prerequisites of a crime, within the meaning of the Anglo-American system of justice, is found lacking, the indictment clause of the Fifth Amendment precludes any trial on the merits, for that clause is jurisdictional:

> "[If an indictment is improperly amended], it is no avail ... to say that the court

> still has jurisdiction of the person and the crime, for, though it has possession of the person and would have jurisdiction of the crime, if it were properly presented by an indictment, the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. If there is nothing before the court which the prisoner, in the language of the Constitution, can be 'held to answer,' he is then entitled to be discharged so far as the offense originally presented to the court by the indictment is concerned. The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a nolle prosequi had been entered. There was nothing before the court on which it could hear evidence or pronounce sentence."
>
> Ex parte Bain, 121 U.S. 1, 11 (1886)

If a valid indictment is jurisdictional, and if a plea of not guilty puts every issue in doubt, it necessarily follows that a defendant must be afforded a meaningful opportunity to challenge any essential element of the indictment brought against him. In this context,

that means that Petitioner has an absolute right to a ruling on the merits of his challenge to the classification of cocaine. To deny him this right is to violate the Fifth Amendment's guarantee.

3. The Opinion Of The Court Of Appeals Sustaining A Non-Contemporaneous Search Incident To Arrest Violates Law Established By This Court And Blurs The Distinction Between Such ("Belton") Searches And Automobile ("Ross") Searches.

In New York v. Belton, 453 U.S. _____, 69 L.Ed 769 (1981), this Court established a new "bright-line" test for warrantless searches conducted incident to the arrest of persons driving automobiles. As the Court itself characterized Belton, that case

> "presents the volatile and fluid situation of an encounter between an arresting officer and a suspect apprehended on the public highway ... Practical necessity requires that we allow an officer in these circumstances to secure thoroughly the automobile without requiring him in haste and under pressure to make

> close calculations about danger to himself or the vulnerability of evidence."
>
> Robbins v. California, ___ U.S. ___, 69 L.Ed.2d 744, at 753 (Powell, J., concurring) (1981).

Thus, after Belton, "when a policeman has made a lawful custodial arrest of the occupants of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." Belton, supra, 69 L.Ed 2d, at 775.

This past term the Court established another bright-line test to deal with the question of the so-called "automobile exception" to the Fourth Amendment. See United States v. Ross, ___ U.S. ____, 72 L.Ed.2d 572 (1982). In essence, Ross teaches that where the automobile exception applies, any part of an automobile and any container inside it may be searched without a warrant or, apparently, without limitations. The

problem presented by this case is the gap which clearly exists between the bright-lines of Ross and Belton.

Simply put, the question presented here is whether a search incident to arrest, such as occurred here, must be contemporaneous with that arrest; if so, the search here was improper, because the search and seizure of the contents of the travel bag was not made until the DEA agent had returned to his office, some distance and some time away. If, however, the automobile exception applies, then non-contemporaneous searches have been authorized by this Court.

Under the facts of this case, however, it is clear that the search conducted was incident to petitioner Coletta's arrest, not pursuant to probable cause to search Mr. Coletta's car, as is easily seen from analysis

of the underpinnings of the "automobile" exception.

As this Court has repeatedly taught, the initial inquiry, that is to say the threshold question for the automobile exception analysis, is not whether a car may be searched but whether it may be stopped for the purpose of a search as it moves on the public highways. See Brinegar v. United States, 338 U.S. 160, 176-177 (1949);

> "[N]o problem of searching ... was presented either in [Carroll v. United States, 267 U.S. 132 (1925)] or here. Both cases involve freedom to use public highways in swiftly moving vehicles for dealing in contraband, and to be unmolested by investigation and search in those movements. In such a case the citizen who has given no good cause for believing he is engaged in that sort of activity is entitled to proceed on his way without interference."

That is, only after an auto stop occurs does the problem addressed in Ross--the scope of the search--comes to

the fore. Because the facts showed that, by prior arrangement, the informant was to give the signal for Coletta's arrest only after the informant had put the cocaine in his bag, no question of a search is presented; rather, Coletta was to be arrested, thus triggering the "incident to" exception. Thus, the validity of the police actions here must be analyzed pursuant to the contemporaneity requirement of Ross. Unless and until this Court rules that a contemporaneous search is not required incident to arrest, the seizure made here must be deemed illegal and the evidence ordered suppressed.

CONCLUSION

For the reasons stated above, this Court should grant a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, and review

and reverse the judgments entered by that Court.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

Stephen J. Heiser, a member of the bar of this Court, certifies that pursuant to Rule 28 of this Court, he filed and served the within:

PETITION FOR A WRIT OF CERTIORARI
To The United States Court Of Appeals
For the Ninth Circuit

on November 1, 1982. Service was made upon counsel for Respondent at the following addresses:

REX E. LEE
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

JOHN C. GIBBONS
Assistant United States Attorney
450 Golden Gate Avenue, 16th Floor
San Francisco, CA 94102

All parties required to be served have been served.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on November 1, 1982, at San Francisco, California.

STEPHEN J. HEISER

APPENDIX A

United States Court of Appeals
For the Ninth Circuit

United States of America,	)	
Plaintiff,	)	Nos.
	)	81-1607X
v.	)	81-1608X
	)	81-1609X
Michael Warren Coletta,	)	81-1610X
John A. Wilms,	)	
Herve Bitton,	)	DC No.
Hernan Castro,	)	CR-81-
	)	0157-SAW
Defendants.	)	

[Filed July 29, 1982]

Before: WALLACE and HUG, Circuit Judges,

BROWN*, District Judge.

HUG, Circuit Judge:

Michael Coletta, John Wilms, Herve Bitton, and Hernan Castro appeal their convictions for violations of the

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* The Honorable Wesley E. Brown, Senior United States District Judge for the District of Kansas, sitting by designation.

Drug Abuse Prevention and Control Act, 21 U.S.C. §§801-966. Appellants sought dismissal of the indictment because of alleged irregularities in the selection of forepersons for grand juries empaneled in the Northern District of California. They now appeal the district court's ruling that they lack standing to alleged discrimination in the selection of forepersons. Appellants also contend that the failure of the Drug Enforcement Administration to review the controlled substance status of cocaine gave rise to due process violations that required dismissal of the indictment. Two of the appellants claim the district court admitted evidence seized in violation of their fourth amendment rights. Finally, Castro seeks a remand for resentencing, arguing that his constitutional and statutory rights were violated at the sentencing hearing.

I

FACTS

The indictment charged the appellants with conspiracy to distribute cocaine. They waived their rights to jury trial, and submitted the case to the district judge on stipulated facts. The stipulations showed that Robert Prezioso, a Drug Enforcement Agency special agent, purchased one ounce of cocaine from Hernan Castro and his cousin, Carlos Castro,[1/] in March, 1981. The Castros advised Prezioso they could provide larger quantities of cocaine. It was agreed that the Castros would arrange for the sale of eight kilograms of cocaine, for which Prezioso would pay $500,000.

On the day of the sale, Prezioso drove with Hernan Castro to a bank, where Castro was permitted to view

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1/ Carlos Castro was indicted with the appellants. He is not a party to this appeal.

and count the $500,000 in cash. Satisfied with Prezioso's ability to pay, Castro signaled his co-conspirators that Prezioso's partner should be allowed to examine the cocaine. The partner, Drug Enforcement Agency informant Raymond Angelone, went to the Castros' apartment, where he met John Wilms and Herve Bitton. Bitton took Angelone to Michael Coletta's apartment, where Coletta showed Angelone a brown travel bag filled with eight plastic bags of cocaine. Angelone tested the drugs and advised Coletta that he was satisfied with their quality and that the transaction could proceed. Coletta returned the cocaine to the travel bag and zipped the bag. Coletta and Angelone then drove to Coletta's car to the Castros' apartment, where they were to meet Prezioso and complete the transaction.

Angelone's uncontroverted testimony at the suppression hearing was

that as he and Coletta waited, Angelone got into the back seat carrying a second travel bag. Pursuant to his instructions, he unzipped Coletta's bag, and prepared to transfer the cocaine to the empty bag. Coletta insisted Angelone leave the cocaine in his travel bag, and Angelone, leaving both bags unzipped, returned to the front seat.

Wilms approached Prezioso's car, confirmed the presence of the cash, and indicated to Coletta that the exchange could take place. Prezioso then gave surveilling agents an arrest signal, and all four appellants were arrested at the scene.

Based on these stipulated facts, each of the appellants was convicted of conspiracy to distribute cocaine. 21 U.S.C. §§841(a)(1) and 846. A lawful search of Coletta's apartment after his arrest yielded an additional sixteen ounces of cocaine, which resulted

in his conviction for possession of cocaine with intent to distribute. 21 U.S.C. §841(a)(1).

II

SELECTION OF GRAND JURY FOREPERSONS

Appellants filed a pretrial motion for dismissal of the indictment on the basis of alleged irregularities in the jury selection process in the Northern District of California. They contended that the procedure employed to appoint grand jury forepersons did not require random selection, but allowed discretion in the choice of a foreperson. Abuse of that discretion was claimed to result in the appointment of a disproportionate number of Caucasian males. Appellants viewed this alleged discrimination as a violation of their

constitutional rights.[2/]

The district court held that the appellants, as Caucasian males, lacked standing to allege discrimination against women and minorities. Further discovery on the issue was precluded, and appellants' request for an evidentiary hearing was denied.[3/] Appellants challenge this preclusion, and seek a

---

[2/] Appellants' motion for dismissal of the indictment included challenges to the composition of both grand and petit juries in the Northern District of California. The district court allowed additional discovery on the jury composition claims. After considering appellants' evidence, it refused to dismiss the indictment. That ruling has not been appealed, and no issue concerning grand or petit jury is before us.

[3/] The Government suggested at oral argument that this ruling did not in fact preclude production of evidence on the issue. Relying on the trial judge's statement that [y]ou may have some standing on other alleged constitutional grounds ....", the Government views the ruling as conditional. It contends appellants were free to submit additional evidence to persuade the judge they did have standing to press these claims, and that their failure to do so bars consideration of the issue now.

[Footnote continued on next page.]

remand for an evidentiary hearing on the issue.

Appellants' challenge to the procedures employed to select grand jury forepersons is based upon Rose v. Mitchell, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979), in which the Supreme Court held that black defendants who alleged systematic exclusion of blacks from appointment as forepersons of state grand juries stated a claim under the equal protection clause. Appellants understand Rose as authorizing broad challenges to the foreperson selection process by all criminal defendants. In asserting their standing to raise this

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[Continuation of fn. 3.]

Our examination of the transcript reveals no such waiver. Clearly appellants thought consideration of the foreperson issue was terminated with the ruling on standing. We view the judge's statement as an indication that constitutional grounds other than equal protection might support appellants' foreperson claim, and as an invitation to pursue one of those alternate theories.

claim, appellants rely on Peters v. Kiff, 407 U.S. 493, 504, 92 S.Ct. 2163, 2169, 33 L.Ed.2d 83 (1972). In that case Peters, a white male, alleged that the grand jury that indicted him and the petit jury that convicted him were empaneled under procedures that excluded blacks. The Court held Peters had standing to state these claims: "whatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race ...."

Appellants' theory, that Peters grants them standing to seek dismissal of their indictment under Rose, fails to distinguish the constitutional bases of these two cases. The Peters defendant alleged a due process violation. In concluding that Peters, a white male, had standing to challenge exclusion of blacks from grand and petit juries, the Court

reasoned that the exclusion of a discernible class from jury service injured not only the specific defendant, but the integrity of the jury system. Due process was violated if the jury failed to reflect "a representative cross section of the community." 407 U.S. at 500, 92 S.Ct. at 2167. The irregularities in jury selection thus threatened injury to Peters's personal rights under the due process clause.

In contrast, the defendants in Rose alleged that discrimination against their race in selection of foreperson violated their rights under the equal protection clause. Their claims implicated not only general societal interest in the integrity of the judicial system, but also a "personal constitutional right" not to be subject to irrational and discriminatory classifications. Rose, 443 U.S. at 561-62, 99 S.Ct. at 3003, contrasting

Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). In order to enforce that right, each defendant was required to "show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs." Id. at 565, 99 S.Ct. at 3005, quoting Castaneda v. Partida, 430 U.S. 482, 494, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498 (1977) (emphasis added). Rose, applying a traditional equal protection analysis, thus holds that in order to assert an equal protection claim plaintiffs must be members of the excluded group. See Alexander v. Louisiana, 405 U.S. 625, 633, 92 S.Ct. 1221, 1226, 31 L.Ed.2d 536 (1972) (Black male's allegation of exclusion of blacks from grand jury states equal protection claim; allegation of exclusion of women distinguished); Hernandez v. Texas, 347 U.S. 475, 477, 74 S.Ct. 667, 669, 98 L.Ed. 866 (1954)

("denial of equal protection ... to try a defendant of a particular race or color under an indictment issued by a grand jury ... from which all persons of his race or color have ... been excluded."). But see United States v. Perez-Hernandez, 672 F.2d 1380, 1386 (11th Cir. 1982) (membership in excluded group not required to bring equal protection claim).

Appellants have not shown that any group of which they are members has been excluded from the foreperson selection process. They have experienced no injury to their personal rights to equal protection, and they lack standing to assert the equal protection rights of the women and minorities who may have been excluded. Warth v. Seldin, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1974); Halet v. Wend Investment Co., 672 F.2d 1305, 1308 (9th Cir. 1982).

Under Peters, these appellants

do have standing to challenge the selection procedures as due process violations. We conclude, however, that appellants' allegations are insufficient to state a claim under the due process clause. Perhaps under some circumstances systematic discrimination in the appointment of grand jury forepersons would so imperil the integrity of the jury system that the resulting indictments and convictions would be fundamentally unfair. However, these appellants have failed to suggest how the selection of one person, serving on a correctly constituted panel, could have a significant impact on the basic fairness of the process.

Appellants have no standing to challenge the selection of forepersons as an equal protection violation. Their allegations are insufficient to imply a due process violation. The district court was correct in denying their motion

to dismiss.

III

CLASSIFICATION OF COCAINE

The Drug Abuse Prevention and Control Act, 21 U.S.C. §811, authorizes the Attorney General to review the classification of substances listed in section 812 of the Act. Where consideration of scientific and medical evidence and evaluation of drug abuse factors suggest to the Attorney General that a drug is misclassified, he may promulgate regulations to remove a drug from the classification schedules or to move it from one schedule to another. Section 841 of the Act specifies the penalties prescribed for drug offenses in terms of the drug's classification under section 812. It is appellants' theory that the interplay of these provisions renders the indictment under which they were charged constitutionally infirm. The district court correctly refused to

dismiss the indictment on this basis.

By moving a controlled substance from one schedule to another, the Attorney General necessarily alters the penalties that result from unlawful possession or distribution of that substance. Appellants view this as an unconstitutional delegation of legislative authority, in that administrative officials may determine the consequences of statutory violations. This court recently considered and rejected that argument. United States v. Alexander, 673 F.2d 287, 289 (9th Cir. 1982).

Next appellants contend that the Attorney General's failure to reclassify cocaine or remove it from the section 812 schedules constitutes an abuse of discretion and renders the penalty for cocaine offenses unconstitutionally vague. Even if we were to assume that, as appellants argue,

scientific evidence supports the reclassification of cocaine, that evidence would not mandate reclassification. Removing a substance from its section 812 schedule requires consideration of, inter alia, the drug's effect on the public health and its potential for abuse. Section 811(c). In view of these factors, the failure to reclassify cocaine is neither irrational nor an abuse of discretion. Alexander, 673 F.2d at 288.

Because of our conclusions here and in Alexander, the district court's refusal to consider the scientific evidence proffered by appellants or to hold an evidentiary hearing was not error.

IV

SEARCH OF TRAVEL BAG

Coletta was arrested as he sat in his car waiting for the exchange of the cocaine for the money. As the Drug

Enforcement Agency officers approached the car, Coletta started the engine. Agent Prezioso instructed Coletta to stop the car, arrested him, and removed him from the vehicle. Prezioso then reached into the back seat and seized two travel bags. One bag, placed in the car by Angelone, was empty. The other, Coletta's travel bag, contained the eight kilograms of cocaine.

Coletta contended Prezioso's warrantless entry into the vehicle and removal of Coletta's bag constituted an unlawful search and seizure. He sought suppression of the cocaine. After an evidentiary hearing, the district judge denied the motion. Although no findings were made, the denial appears to have been based on the application of the plain view doctrine.

Agents Prezioso and Plattos, as well as the informant, Angelone, testified at the hearing that Coletta's

bag was partially unzipped and its contents visible. Coletta testified that before leaving his apartment, he covered the cocaine with a towel and zipped the bag shut. He also stated that as he waited for the exchange, he transferred the bag from the back seat to the car's rear floor, so that the cocaine would not have been in plain view. It would appear that implicit in the district judge's denial of the suppression motion was a finding that he believed the testimony of the agents and Angelone and discredited that of Coletta. This credibility determination will not be disturbed on appeal. See United States v. Harrington, 636 F.2d 1182, 1185 (9th Cir. 1980) (denial of suppression motion to be upheld if reasonable view of evidence supports it).

In addition, the Supreme Court recently held that the warrantless search of a vehicle and search and seizure of

its contents are lawful where officers have legitimately stopped the vehicle and they have probable cause to believe it contains contraband. United States v. Ross, ___ U.S. ___, ___, 102 S.Ct. 2157, 2173, 72 L.Ed.2d ___ (1982). Because the agents had probable cause to arrest Coletta, their stop of his vehicle was legitimate. Agent Prezioso had been informed by Castro that they would be met at the Castros' apartment by the suppliers, who would have the cocaine. He observed Coletta and Angelone in Coletta's car. After Wilms confirmed to Coletta the presence of the money, Prezioso turned the money over to Castro and was instructed by Castro to walk to Coletta's car to complete the exchange. Without question, these facts provided probable cause to believe the cocaine was in the car and therefore justified the warrantless search of the car. In addition, the remaining requirements

imposed by Ross are satisfied. The officers anticipated that the drugs would be in Angelone's bag, rather than Coletta's; therefore, probable cause to search was not limited to a specific container. Id at ___ & n.22, 102 S.Ct. at 2168 & n.22. The bag was of such a size and shape that it was likely to contain the drugs. Id. at ___, 102 S.Ct. at 2169. The search and seizure of the bags were lawful, and the district court correctly denied the motion to suppress.[4/]

[4/] At oral argument before this panel, Coletta suggested that Ross requires that the search be incident to arrest, relying on United States v. Cleary, 656 F.2d 1302 (9th Cir. 1981), vacated, ___ U.S. ___, 102 S.Ct. 2919, 72 L.Ed.2d ___ (1982) (remanded for consideration in light of Ross). At the time of arrest, agents looked into the bag and reasonably concluded it contained cocaine. In our view, that examination comprised the challenged search, rather than the thorough examination and analysis of the drug made later at Drug Enforcement Agency headquarters. We therefore need not consider whether Ross authorizes only searches made incident to an arrest.

V

SEARCH OF BITTON'S APARTMENT

Following appellants' arrests, a warrant was issued for the search of Bitton's apartment. Bitton claimed that the agents requesting the warrant had failed to establish a nexus between Bitton's home and the crime with which he was charged. Because of this failure, he reasoned there was not probable cause to believe that the drugs and drug paraphernalia listed in the warrant could be found in Bitton's apartment. He contended this lack of probable cause required invalidation of the warrant and suppression of all evidence seized in the apartment. The district court denied the suppression motion.

This court does not review motions to suppress as abstract legal theories divorced from the facts of the case. When Bitton's legal argument is tied to the pertinent facts, its lack of

merit is patent. Before this court, Bitton identified only one specific item of evidence seized from his apartment: a packing carton for a pistol. This item is totally without evidentiary significance.[5/] Bitton stipulated that he was carrying a pistol on the day of the transaction, and there was more than ample evidence of Bitton's participation in the conspiracy. The district court's failure to suppress this evidence, if erroneous, was harmless beyond any doubt. See United States v. Hackett, 638 F.2d 1179, 1186 (9th Cir. 1980), cert. denied, 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981); United States v. Gulma, 563 F.2d 386, 390 n.3 (9th Cir. 1977). We therefore need not consider Bitton's

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[5/] Bitton was indicted for violation of 18 U.S.C. §924(c)(1), in addition to the conspiracy charge. The count alleging use of a firearm was dismissed. Even if Bitton had been prosecuted on that charge, the evidentiary value of the packing carton is difficult to perceive.

challenge to the warrant.

VI

REFUSAL TO CONTINUE SENTENCING

Following the verdicts, Castro discharged his trial attorney, who had failed to secure Castro's release on bail pending sentencing. The new attorney, appointed September 8, moved on September 18 for a two-week continuance of the sentencing, then set for September 23. The attorney did not interview Castro prior to September 23. He stated at the sentencing hearing that he was unfamiliar with Castro's background and the facts of the case, and that he had not seen the presentence report.

The district court denied the motion for a continuance and proceeded with sentencing, after assuring Castro's attorney that the court would be receptive to a motion for modification of judgment, if the attorney's review of the

case uncovered grounds for such a motion. The judge instructed the probation department to make the presentence report available. The attorney agreed that this procedure was "satisfactory."

Castro now claims denial of a continuance violated due process, his right to counsel, and the requirements of Fed.R.Crim.P. 32(c)(3)(A). He seeks a remand for resentencing.

Castro alleges Fed.R.Crim.P.32(c)(3)(A) was violated because his attorney did not see the presentence report prior to sentencing. That rule provides in Part:

> Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presence investigative exclusive of any recommendation as to sentence, ...; and the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the

presentence report.

The court is required to disclose the report only if the defendant requests disclosure. United States v. Winn, 577 F.2d 86, 92 (9th Cir. 1978). Castro's attorney made no such request prior to the sentencing hearing. His inability to review the report thus resulted from his own failure to act, not from the judge's refusal to grant a continuance. Fed.R.Crim.P.32 was not violated.

Castro claims that the result of the denial of a continuance was to render his attorney unable to effectively comment on the report, thus depriving Castro of his rights to counsel and due process. The due process clause does not require disclosure of the presentence report. Williams v. New York, 337 U.S. 241, 249-51, 69 S.Ct. 1079, 1084-85, 93 L.Ed. 1337 (1949). Due process does require that the sentencing judge listen

to and fairly consider information material to mitigation of punishment. United States v. Doe, 655 F.2d 920, 927 (9th Cir. 1981); see also United States v. Wolfson, 634 F.2d 1217, 1221-22 (9th Cir. 1980). Castro has not demonstrated that the procedure adopted by the district court failed to satisfy this requirement. Both Castro and his attorney were given an opportunity to address the court prior to sentencing. Castro does not question the judge's assurance that he would consider mitigating evidence submitted after sentencing. Nor does he suggest that the report contained unfair or unsupported allegations. See United States v. Weston, 448 F.2d 626, 634 (9th Cir. 1971), cert. denied, 404 U.S. 1061, 92 S.Ct. 748, 30 L.Ed.2d 749 (1972) (information in presentence report must be sufficient to be persuasive of validity of charges made in report). We

therefore conclude that the judge's refusal to grant a continuance, especially in view of the procedure he adopted, did not threaten any of Castro's constitutionally protected interests.

Each of the convictions is AFFIRMED.

APPENDIX B

United States Court of Appeals
For The Ninth Circuit

United States of America,	)	
	)	
Plaintiff,	)	
	)	Nos.
v.	)	81-1607X
	)	81-1608X
Michael Warren Coletta,	)	81-1609X
John A. Wilms,	)	81-1610X
Herve Bitton,	)	
Hernan Castro,	)	D.C. No.
	)	CR-81-
Defendants.	)	0157-SAW
	)	

[Filed September 2, 1982]

ORDER

Before: WALLACE and HUG, Circuit Judges, BROWN*, District Judge.

The panel, as constituted in the above case, has voted to deny the petition for rehearing.

The petition for rehearing is denied.

* The Honorable Wesley E. Brown, Senior United States District Judge for the District of Kansas, citting by designation.

§ 811. Authority and criteria for classification of substances —Rules and regulations of Attorney General; hearing

(a) The Attorney General shall apply the provisions of this subchapter to the controlled substances listed in the schedules established by section 812 of this title and to any other drug or other substance added to such schedules under this subchapter. Except as provided in subsections (d) and (e) of this section, the Attorney General may by rule—

(1) add to such a schedule or transfer between such schedules any drug or other substance if he—

(A) finds that such drug or other substance has a potential for abuse, and

(B) makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 812 of this title for the schedule in which such drug is to be placed;

or

(2) remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule.

Rules of the Attorney General under this subsection shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by subchapter II of chapter 5 of Title 5. Proceedings for the issuance, amendment, or repeal of such rules may be initiated by the Attorney General (1) on his own motion, (2) at the request of the Secretary, or (3) on the petition of any interested party.

Evaluation of drugs and other substances

(b) The Attorney General shall, before initiating proceedings under subsection (a) of this section to control a drug or other substance or to remove a drug or other substance entirely from the schedules, and after gathering the necessary data, request from the Secretary a scientific and medical evaluation, and his recommendations, as to whether such drug or other substance should be so controlled or removed as a controlled substance. In making such evaluation of recommendations, the Secretary shall consider the factors listed in paragraphs (2), (3), (6), (7), and (8) of subsection (c) of this section and any scientific or medical considerations involved in paragraphs (1), (4), and (5) of such subsection. The recommendations of the Secretary shall include recommendations with respect to the appropriate schedule, if any, under which such drug or other substance should be listed. The evaluation and the recommendations of the Secretary shall be made in writing and submitted to the Attorney General within a reasonable time. The recommendations of the Secretary to the Attorney General shall be binding on the Attorney General as to such scientific and medical matters, and if the Secretary recommends that a drug or other substance not be controlled, the Attorney General shall not control the drug or other substance. If the Attorney General determines that these facts and all other relevant data constitute substantial evidence of potential for abuse such as to warrant control or substantial evidence that the drug or other substance should be removed entirely from the schedules, he shall initiate proceedings for control or removal, as the case may be, under subsection (a) of this section.

Factors determinative of control or removal from schedules

(c) In making any finding under subsection (a) of this section or under subsection (b) of section 812 of this title, the Attorney General shall consider the following factors with respect to each drug or other substance proposed to be controlled or removed from the schedules:

(1) Its actual or relative potential for abuse.

(2) Scientific evidence of its pharmacological effect, if known.

(3) The state of current scientific knowledge regarding the drug or other substance.

(4) Its history and current pattern of abuse.

(5) The scope, duration, and significance of abuse.

(6) What, if any, risk there is to the public health.

(7) Its psychic or physiological dependence liability.

(8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

International treaties, conventions, and protocols requiring control; procedures respecting changes in drug schedules of Convention on Psychotropic Substances

(d)(1) If control is required by United States obligations under international treaties, conventions, or protocols in effect on the effective date of this part, the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, without regard to the findings required by subsection (a) of this section or section 812(b) of this

title and without regard to the procedures prescribed by subsections (a) and (b) of this section.

(2)(A) Whenever the Secretary of State receives notification from the Secretary-General of the United Nations that information has been transmitted by or to the World Health Organization, pursuant to article 2 of the Convention on Psychotropic Substances, which may justify adding a drug or other substance to one of the schedules of the Convention, transferring a drug or substance from one schedule to another, or deleting it from the schedules, the Secretary of State shall immediately transmit the notice to the Secretary of Health, Education, and Welfare who shall publish it in the Federal Register and provide opportunity to interested persons to submit to him comments respecting the scientific and medical evaluations which he is to prepare respecting such drug or substance. The Secretary of Health, Education, and Welfare shall prepare for transmission through the Secretary of State to the World Health Organization such medical and scientific evaluations as may be appropriate regarding the possible action that could be proposed by the World Health Organization respecting the drug or substance with respect to which a notice was transmitted under this subparagraph.

(B) Whenever the Secretary of State receives information that the Commission on Narcotic Drugs of the United Nations proposes to decide whether to add a drug or other substance to one of the schedules of the Convention, transfer a drug or substance from one schedule to another, or delete it from the schedules, the Secretary of State shall

transmit timely notice to the Secretary of Health, Education, and Welfare of such information who shall publish a summary of such information in the Federal Register and provide opportunity to interested persons to submit to him comments respecting the recommendation which he is to furnish, pursuant to this subparagraph, respecting such proposal. The Secretary of Health, Education, and Welfare shall evaluate the proposal and furnish a recommendation to the Secretary of State which shall be binding on the representative of the United Sates in discussions and negotiations relating to the proposal.

(3) When the United States receives notification of a scheduling decision pursuant to article 2 of the Convention on Psychotropic Substances that a drug or other substance has been added or transferred to a schedule specified in the notification or receives notification (referred to in this subsection as a "schedule notice") that existing legal controls applicable under this subchapter to a drug or substance and the controls required by the Federal Food, Drug, and Cosmetics Act do not meet the requirements of the schedule of the Convention in which such drug or substance has been placed, the Secretary of Health, Education, and Welfare, after consultation with the Attorney General, shall first determine whether existing legal controls under this subchapter applicable to the drug or substance and the controls required by the Federal Food, Drug, and Cosmetics Act, meet the requirements of the schedule specified in the notification or schedule notice and shall take the following action:

(A) If such requirements are met by such existing controls but the Secretary of Health, Education, and

Welfare nonetheless believes that more stringent controls should be applied to the drug or substance, the Secretary shall recommend to the Attorney General that he initiate proceedings for scheduling the drug or substance, pursuant to subsections (a) and (b) of this section, to apply to such controls.

(B) If such requirements are not met by such existing controls and the Secretary of Health, Education, and Welfare concurs in the scheduling decision or schedule notice transmitted by the notification, the Secretary shall recommend to the Attorney General that he initiate proceedings for scheduling the drug or substance under the appropriate schedule pursuant to subsections (a) and (b) of this section.

(C) If such requirements are not met by such existing controls and the Secretary of Health, Education, and Welfare does not concur in the scheduling decision or schedule notice transmitted by the notification, the Secretary shall—

(i) if he deems that additional controls are necessary to protect the public health and safety, recommend to the Attorney General that he institute proceedings for scheduling the drug or substance pursuant to subsections (a) and (b) of this section, to apply such additional controls;

(ii) request the Secretary of State to transmit a notice of qualified acceptance, with the period specifiled in the Convention, pursuant to paragraph 7 of article 2 of the Convention, to the Secretary-General of the United Nations;

(iii) request the Secretary of State to transmit a notice of qualified acceptance as prescribed in clause (ii) and request the Secretary of State to ask for a review by the Economic and Social Council of

the United Nations, in accordance with paragraph 8 of article 2 of the Convention, of the scheduling decision; or

(iv) in the case of a schedule notice, request the Secretary of State to take appropriate action under the Convention to initiate proceedings to remove the drug or substance from the schedules under the Convention or to transfer the drug or substance to a schedule under the Convention different from the one specified in the schedule notice.

(4)(A) If the Attorney General determines, after consultation with the Secretary of Health, Education, and Welfare, that proceedings initiated under recommendations made under paragraph (B) or (C)(1) of paragraph (3) will not be completed within the time period required by paragraph 7 of article 2 of the Convention, the Attorney General, after consultation with the Secretary and after providing interested persons opportunity to submit comments respecting the requirements of the temporary order to be issued under this sentence, shall issue a temporary order controlling the drug or substance under schedule IV or V, whichever is most appropriate to carry out the minimum United States obligations under paragraph 7 of article 2 of the Convention. As a part of such order, the Attorney General shall, after consultation with the Secretary, except such drug or substance from the application of any provision of part C of this subchapter which he finds is not required to carry out the United States obligations under paragraph 7 of article 2 of the Convention. In the case of proceedings initiated under subparagraph (B) of paragraph (3), the Attorney General, concurrently with the issuance of such order, shall request the Secretary of State

to transmit a notice of qualified acceptance to the Secretary-General of the United Nations pursuant to paragraph 7 of article 2 of the Convention. A temporary order issued under this subparagraph controlling a drug or other substance subject to proceedings initiated under subsections (a) and (b) of this section shall expire upon the effective date of the application to the drug or substance of the controls resulting from such proceedings.

(B) After a notice of qualified acceptance of a scheduling decision with respect to a drug or other substance is transmitted to the Secretary-General of the United Nations in accordance with clause (ii) or (iii) of paragraph (3)(C) or after a request has been made under clause (iv) of such paragraph with respect to a drug or substance described in a schedule notice, the Attorney General, after consultation with the Secretary of Health, Education, and Welfare and after providing interested persons opportunity to submit comments respecting the requirements of the order to be issued under this sentence, shall issue an order controlling the drug or substance under schedule IV or V, whichever is most appropriate to carry out the minimum United States obligations under paragraph 7 of article 2 of the Convention in the case of a drug or substance for which a notice of qualified acceptance was transmitted or whichever the Attorney General determines is appropriate in the case of a drug or substance described in a schedule notice. As a part of such order, the Attorney General shall, after consultation with the Secretary, except such drug or substance from the application of any provision of part C of this subchapter which he finds is not required to carry ou the United States obligations under paragraph 7

of article 2 of the Convention. If, as a result of a review under paragraph 8 of article 2 of the Convention of the scheduling decision with respect to which a notice of qualified acceptance was transmitted in accordance with clause (ii) or (iii) of paragraph (3)(C)—

(i) the decision is reversed, and

(ii) the drug or substance subject to such decision is not required to be controlled under schedule IV or V to carry out the minimum United States obligations under paragraph 7 of article 2 of the Convention.

the order issued under this subparagraph with respect to such drug or substance shall expire upon receipt by the United States of the review decision. If, as a result of action taken pursuant to action initiated under a request transmitted under clause (iv) of paragraph (3)(C), the drug or substance with respect to which such action was taken is not required to be controlled under schedule IV or V, the order issued under this paragraph with respect to such drug or substance shall expire upon receipt by the United States of a notice of the action taken with respect to such drug or substance under the Convention.

(C) An order issued under subparagraph (A) or (B) may be issued without regard to the findings required by subsection (a) of this section or by section 312(b) of this title and without regard to the procedures prescribed by subsection (a) or (b) of this section.

(5) Nothing in the amendments made by the Psychotropic Substances Act of 1978 or the regulations or orders promulgated thereunder shall be construed to preclude requests by the Secretary of Health, Education, and Wel-

fare or the Attorney General through the Secretary of State, pursuant to article 2 or other applicable provisions of the Convention, for review of scheduling decisions under such Convention, based on new or additional information.

Immediate precursors

(e) The Attorney General may, without regard to the findings required by subsection (a) of this section or section 812(b) of this title and without regard to the procedures prescribed by subsections (a) and (b) of this section, place an immediate precursor in the same schedule in which the controlled substance of which it is an immediate precursor is placed or in any other schedule with a higher numerical designation. If the Attorney General designates a substance as an immediate precursor and places it in a schedule, other substances shall not be placed in a schedule solely because they are its precursors.

Abuse potential

(f) If, at the time a new-drug application is submitted to the Secretary for any drug having a stimulant, depressant, or hallucinogenic effect on the central nervous system, it appears that such drug has an abuse potential, such information shall be forwarded by the Secretary to the Attorney General.

Non-narcotic substances sold over the counter without a prescription: dextromethorphan

(g)(1) The Attorney General shall by regulation exclude any non-narcotic substance from a schedule if such substance may, under the Federal Food, Drug, and Cosmetic

Act, be lawfully sold over the counter without a prescription.

(2) Dextromethorphan shall not be deemed to be included in any schedule by reason of enactment of this subchapter unless controlled after the date of such enactment pursuant to the foregoing provisions of this section.

§ 812. Schedules of controlled substances—Establishment

(a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semi-annual basis during the two-year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter.

Placement on schedules; findings required

(b) Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on the effective date of this part, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

(1) Schedule I.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

(2) Schedule II.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.

(C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.

(3) Schedule III.—

(A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

(4) Schedule IV.—

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule III.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III.

(5) Schedule V.—

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule IV.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV.

§ 841. Prohibited acts A—Unlawful acts.

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000,

or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person, shall, except as provided in paragraphs (4), (5), and (6) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $10,000,

or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than $20,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

(4) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 844 of this title.

(5) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense, except as authorized by this subchapter, phencyclidine (as defined in section 830(e)(2) of this title) shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this subchapter or subchapter III of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(6) In the case of a violation of subsection (a) of this section involving a quantity of marihuana exceeding 1,000 pounds, such person shall be sentenced to a term of imprisonment of not more than 15 years, and in addition, may be fined not more than $125,000. If any person commits such a violation after one or more prior convictions of such person for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this subchapter, subchapter II of this chapter, or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, and in addition, may be fined not more than $250,000.

Special parole term

(c) A special parole term imposed under this section or section 845 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

Piperidine offenses and penalty

(d) Any person who knowingly or intentionally—

(1) possesses any piperidine with intent to manufacture phencyclidine except as authorized by this subchapter, or

(2) possesses any piperidine knowing, or having reasonable cause to believe, that the piperidine will be used to manufacture phencyclidine except as authorized by this subchapter,

shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both.

§ 877. Judicial review

All final determinations, findings, and conclusions of the Attorney General under this subchapter shall be final and conclusive decisions of the matters involved, except that any person aggrieved by a final decision of the Attorney General may obtain review of the decision in the United States Court of Appeals for the District of Columbia or for the circuit in which his principal place of business is located upon petition filed with the court and delivered to the Attorney General within thirty days after notice of the decision. Findings of fact by the Attorney General, if supported by substantial evidence, shall be conclusive.

Supreme Court, U.S.
FILED
JAN 17 1983
ALEXANDER L. STEVAS

No. 82-798

In the Supreme Court of the United States

OCTOBER TERM, 1982

MICHAEL WARREN COLETTA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners, white males, had standing to raise an equal protection challenge to procedures employed for selection of grand jury forepersons that they alleged to have resulted in underrepresentation of women and blacks.

2. Whether the Drug Enforcement Administration unlawfully failed to alter the controlled substance classification of cocaine.

3. Whether the warrantless search of a container found in an automobile, supported by probable cause to search the automobile, is impermissible under the Fourth Amendment because commenced contemporaneously with a lawful arrest, or because completed later on, at another location.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-27) is reported at 682 F.2d 820.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1982. A petition for rehearing was denied on September 2, 1982 (Pet. App. B). The petition for a writ of certiorari was filed on November 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial on stipulated facts in the United States District Court for the Northern District of California, petitioners Michael Coletta, John Wilms, Herve Bitton, and Hernan Castro were convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and

846. In addition, petitioner Coletta was convicted of possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Petitioner Coletta received concurrent sentences of ten years' imprisonment and a $25,000 fine on each count; petitioner Wilms was sentenced to two years' imprisonment and petitioner Castro to five years' imprisonment. Petitioner Bitton was sentenced pursuant to the Youth Corrections Act, 18 U.S.C. 5010. The court of appeals affirmed.

1. The trial stipulations and the evidence adduced at a suppression hearing showed that Robert Prezioso, a Drug Enforcement Administration Special Agent, purchased one ounce of cocaine from petitioner Hernan Castro and his cousin, Carlos Castro, in March 1981.[1] After the Castros indicated that they were able to provide larger quantities of cocaine, Prezioso arranged to purchase eight kilograms of cocaine for $500,000 (Pet. App. A-3).

On the day of the sale, Prezioso drove with Hernan Castro to a bank, where Castro was permitted to count the $500,000 in cash. Satisfied with Prezioso's ability to pay, Castro signalled his co-conspirators that Prezioso's "partner," an informant named Raymond Angelone, should be allowed to examine the cocaine. Angelone went to the Castros' apartment, where he met petitioners Wilms and Bitton. Bitton took Angelone to petitioner Coletta's apartment, where Coletta showed Angelone a brown travel bag filled with eight bags of cocaine. Angelone tested the drugs and informed Coletta that he was satisfied with their quality and that the transaction could proceed. Coletta returned the cocaine to the travel bag and zipped the bag. Coletta and

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[1]Carlos Castro was also convicted of conspiracy to distribute cocaine; he did not appeal his conviction.

Angelone then drove back to the Castros' apartment in Coletta's car to meet Prezioso and complete the transaction (Pet. App. A-4).

Angelone and petitioner Coletta waited in the car outside the apartment. Angelone, carrying his own travel bag, got into the back seat. Pursuant to his instructions from law enforcement officers, Angelone unzipped Coletta's bag and prepared to transfer the cocaine to his own bag. Coletta insisted that Angelone leave the cocaine in place, however, and Angelone returned to the front seat, leaving both bags unzipped (Pet. App. A-5). Petitioner Wilms next approached Agent Prezioso's car, also waiting outside the apartment, and confirmed the presence of the cash. When Wilms indicated to Coletta that the exchange could take place, Prezioso gave surveilling agents an arrest signal. The DEA agents then approached Coletta's car. Coletta started the engine. Agent Prezioso instructed him to stop the car, arrested him and removed him from the vehicle. Prezioso then reached into the back seat and seized the two travel bags. The bag placed in the car by Angelone was empty; the other, Coletta's bag, contained eight kilograms of cocaine (Pet. App. A-17 to A-18).[2]

2. Prior to trial, petitioners filed motions to dismiss the indictment on the basis of alleged irregularities in the jury selection process in the Northern District of California. They observed that 25 of the 28 grand jury forepersons selected between January 5, 1977, and June of 1981 in that district were white males, and that, of the others, two were female and none was black. Petitioners alleged that a non-random method of selection was employed that had been

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[2]A later search of petitioner Coletta's apartment pursuant to a search warrant yielded an additional 16 ounces of cocaine, which provided the basis for the second charge against him (Pet. App. A-5 to A-6).

abused to discriminate against women and blacks. These practices, petitioners argued, violated their equal protection interests.

The district court held that petitioners, as white males, lacked standing to complain of discrimination against women and minorities. It accordingly denied petitioner's request for an evidentiary hearing. The district court remarked, however, that petitioners might "have some standing on other alleged constitutional grounds" (see Pet. App. A-7 & n.3).

The court of appeals affirmed, holding that because they were not members of the allegedly excluded group and had experienced no injury to their personal rights to equal protection, petitioners lacked standing to assert any equal protection claim (Pet. App. A-12). The court of appeals further concluded that petitioners had standing, under *Peters* v. *Kiff*, 407 U.S. 493 (1972), to challenge the selection procedures on due process grounds. The court determined, however, that petitioners' allegations were insufficient to state a due process claim (Pet. App. A-13):

> Perhaps under some circumstances systematic discrimination in the appointment of grand jury forepersons would so imperil the integrity of the jury system that the resulting indictments and convictions would be fundamentally unfair. However, [petitioners] have failed to suggest how the selection of one person, serving on a correctly constituted panel, could have a significant impact on the basic fairness of the process.

ARGUMENT

1. Petitioners contend initially (Pet. 9-15) that the court of appeals erroneously held that they lacked standing to seek dismissal of the indictment on the ground that women and minority groups, to which they do not belong, had been denied equal protection of the laws by the procedures used

to select grand jury forepersons in the Northern District of California. Significantly, however, petitioners do not challenge — or even acknowledge — the court of appeals' concurrent determinations that they do have standing to challenge those selection procedures on due process grounds, but that their particular allegations are insufficient to state a due process claim. The contention that is advanced here is unsupported by pertinent decisions of this Court and does not warrant further review at this time.

a. As petitioners concede (Pet. 10), no decision of this Court indicates that nonmembers of a class that has allegedly been discriminated against in selection of grand jury forepersons may raise an equal protection claim founded upon such discrimination. Careful examination of this Court's decisions cited by petitioners (Pet. 10-11) reveals, moreover, that they do not contain the contradictory indications respecting such a claim that petitioners attribute to them (Pet. 10).

In *Peters* v. *Kiff*, 407 U.S. 493 (1972), a case decided without an opinion for the Court, Justice Marshall, joined by Justices Douglas and Stewart, concluded (*id.* at 504):

> [W]hatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law.

Although an equal protection claim was also presented, Justice Marshall expressly declined to reach that issue. 407 U.S. at 496, 497 n.5. Moreover, the conclusion stated in the lead opinion was based upon the impact of exclusion of minority members upon the integrity of the judicial process, rather than upon any discriminatory effect suffered by the *Peters* defendant, who was white. *Id.* at 497, 501-504. Justice White, joined by Justices Brennan and Powell,

concurred in the judgment, relying primarily, if not exclusively, upon 18 U.S.C. 243, which provides that racial discrimination in jury selection is a crime (*id.* at 505-507).

Peters therefore does not support petitioners' equal protection claim, because the Court considered only a due process claim resting upon a defective selection procedure for grand and petit jury members that was determined to destroy the integrity of the factfinding process and to violate the criminal proscription of 18 U.S.C. 243. Here, the court of appeals concluded that petitioners *did* have standing to raise such a due process claim, but that the alleged procedural defects in selection of forepersons did not impermissibly affect the "basic fairness of the [indictment] process" (Pet. App. A-13).[3] Moreover, petitioner's allegations plainly do not make out a violation of 18 U.S.C. 243, which does not govern selection of grand jury forepersons.[4] Petitioner has not sought review of the latter conclusion; accordingly he can claim no support from *Peters*.

None of the other decisions of this Court cited by petitioner suggests that a defendant not a member of a class of persons allegedly underrepresented among grand jurors or forepersons may seek dismissal of an indictment on equal protection grounds. *Rose* v. *Mitchell*, 443 U.S. 545 (1979), and *Castaneda* v. *Partida*, 430 U.S. 482 (1977), address the equal protection claims of members of the allegedly underrepresented class. As petitioners acknowledge (Pet. 11), in

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[3]This Court has reserved the question whether discrimination in the choice of grand jury forepersons ever constitutes a denial of equal protection, *Rose* v. *Mitchell*, 443 U.S. 545, 551 n.4 (1979), and has not, to our knowledge, addressed the analogous due process issue. See page 9, note 7, *infra*.

[4]We note as well that the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.*, makes no provision respecting the selection of grand jury forepersons, and is accordingly, contrary to petitioner's suggestion (Pet. 3-4), inapposite.

Castaneda the Court employed language that strongly suggested a view contrary to theirs (430 U.S. at 492, quoting *Hernandez* v. *Texas*, 347 U.S. 475, 477 (1954)):

> This Court had long recognized that "it is a denial of the equal protection of the laws to try a defendant of a particular race or color under an indictment issued by a grand jury . . . from which all persons of his race or color have, solely because of that race or color, been excluded * * *."

Similar language was employed most recently in *Rose* v. *Mitchell*, *supra*, 443 U.S. at 565.[5]

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[5]Petitioners point to other language in *Rose* (443 U.S. at 556) indicating that "a criminal defendant's right to equal protection of the laws has been denied when he is indicted by a grand jury from which members of a racial group purposefully have been excluded." But *Rose* did not present the question whether a nonmember of the underrepresented group has standing to raise an equal protection claim founded upon alleged discrimination, and the cases cited by the Court in connection with the quoted statement lend no support to petitioner's claim. The language petitioner relies upon, as well as the Court's ensuing statement that an indictment returned by an improperly constituted grand jury is to be quashed "without inquiry into whether the defendant was prejudiced in fact by the discrimination at the grand jury stage" (*ibid.*), was addressed to the separate question whether a valid conviction upon such an indictment moots any claim of prejudice by a member of the underrepresented group. See 443 U.S. at 551-559. Moreover, Justice Stevens, who by his joinder therein made this portion of the opinion the opinion of the Court, expressed reservations about the rule adopted, joining the opinion because of considerations of stare decisis, 443 U.S. at 593-594. Justice Stevens plainly did not intend to join in any novel holding respecting standing. The views of the *Rose* Court on the standing question are instead reflected in the portion of that opinion addressing the merits (443 U.S. at 565, quoting *Castaneda* v. *Partida*, *supra*, 430 U.S. at 494):

> [I]t remains true that to be entitled to habeas relief the present respondents were required to prove discrimination under the standards set out in this Court's cases. That is, "in order to show that an equal protection violation has occurred in the context of

b. The decision of the court of appeals correctly applies the foregoing decisions of this Court, as well as the decision in *Alexander* v. *Louisiana*, 405 U.S. 625, 633 (1972), suggesting that a defendant not a member of an underrepresented class lacks standing to pursue an equal protection challenge to an indictment based upon grand jury selection procedures. More generally, the decision of the court of appeals is consistent with the decisions of this Court recognizing that a party ordinarily may not raise the constitutional rights of strangers. *E.g.*, *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975); *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 (1973).[6]

c. Contrary to petitioners' contention (Pet. 12), the decision of the court of appeals does not create a conflict with the Eleventh Circuit's decision in *United States* v. *Perez-Hernandez*, 672 F.2d 1380 (1982), that should be resolved by this Court at this time. To be sure, in *Perez-Hernandez* a panel of the Eleventh Circuit, relying on *Peters* v. *Kiff*,

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grand jury [foreman] selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs."

And the Court in *Rose* stressed (443 U.S. at 565) that the respondents before it "as Negroes, are members of" the allegedly underrepresented group. See page 6 note 3, *supra*.

[6]Contrary to petitioners' contention (Pet. 13-14), the relevant equal protection decisions of this Court are not inapposite because they address the rights of plaintiffs in civil litigation. This Court's decisions in criminal cases where constitutional violations are asserted make clear that the defendant must show that the assertion violation was in derogation of his personal rights. See, e.g., *United States* v. *Salvucci*, 448 U.S. 83, 86-87 (1980); *Rakas* v. *Illinois*, 439 U.S. 128 (1978); *Brown* v. *United States*, 411 U.S. 223 (1973); *Alderman* v. *United States*, 394 U.S. 165 (1969). *Peters* v. *Kiff*, *supra*, is not to the contrary. Rather, the decision there merely reflects a determination that the due process rights of every defendant include the right to have critical procedures carried by a competently constituted tribunal. 407 U.S. at 496-497, 498-504.

supra, held that a male of Hispanic descent had standing to raise an equal protection challenge to his indictment based upon alleged discrimination against blacks and women in the selection of grand jury forepersons. 672 F.2d at 1385-1386. The panel recognized that language in *Castaneda* v. *Partida*, and *Rose* v. *Mitchell* suggested a contrary result but rejected that result, reasoning that "[t]he holding in *Peters* v. *Kiff* is clear and unambiguous and has never been expressly overruled." 672 F.2d at 1386 (footnote omitted).

Unlike the court below, the Eleventh Circuit panel failed to observe a distinction between due process claims such as that discussed in *Peters* v. *Kiff* and equal protection claims such as that advanced here. The defendant in *Perez-Hernandez* did not observe this distinction either. See 672 F.2d at 1382-1383. Thus there is no necessary conflict between the decision below, which recognizes a non-member's standing to complain on due process grounds of discrimination that taints the grand jury process, and the decision in *Perez-Hernandez*.[7] On the other hand, to the extent that *Perez-Hernandez* is read to appiy to claims of

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[7]Because petitioners have not sought review of the decision below insofar as their due process claim was deemed legally insufficient, there is no need to consider whether that decision conflicts with the *Perez-Hernandez* court's view (672 F.2d at 1386) that discrimination affecting grand jury foreperson selection, like discrimination in selection of the grand jury itself, may require that a conviction be set aside in an appropriate case. See page 6 note 3, *supra*. We note, in any event, that Judge Morgan did not join this aspect of the panel decision in *Perez-Hernandez* (see 672 F.2d at 1388-1389) and that a different panel of the Eleventh Circuit subsequently endorsed Judge Morgan's view that no constitutional right is implicated in the selection procedures for grand jury forepersons because of the relative insignificance of the role of that office in the federal grand jury system. *United States* v. *Holman*, 680 F.2d 1340, 1356 n.12 (1982). We note as well that this aspect of the decision below turns upon the sufficiency of petitioners' allegations and does not necessarily preclude relief in a case where systematic discrimination was shown. Pet. App. A-13.

discrimination that do not impair the integrity of the indictment process and thus do not implicate due process concerns, it is wrongly decided because the panel overlooked the due process basis for the holding of *Peters* v. *Kiff*. Indeed, a different panel of the Eleventh Circuit has called in question the decision in *Perez-Hernandez*, observing that *Castaneda* v. *Partida*, *supra*, 430 U.S. at 494, contains "unambiguous language" contrary to the earlier panel's conclusion. *United States* v. *Holman*, 680 F.2d 1340, 1357 (1982). The *Holman* panel nevertheless considered itself bound by *Perez-Hernandez*, 680 F.2d at 1356 n.11, noting that en banc review is appropriate to resolve an intra-circuit disagreement. Because the Eleventh Circuit concluded in both *Perez-Hernandez* and *Holman* that the government had successfully rebutted the defendant's prima facie showing of discrimination, and accordingly affirmed the challenged convictions (672 F.2d at 1387-1388; 680 F.2d at 1357), neither case has provided the appropriate opportunity for further consideration of the issue within the Eleventh Circuit. But given the likelihood of reappraisal should the issue again arise in that court, and the serious flaws in the *Perez-Hernandez* panel's analysis, there is no occasion for this Court to resolve any tension between the decision below and *Perez-Hernandez*.[8]

2. Petitioners next contend (Pet. 15-33) that the failure of the federal Drug Enforcement Agency to employ the Attorney General's authority under 21 U.S.C. 811(a) to remove cocaine from Schedule II of the listing of controlled substances established by 21 U.S.C. (& Supp. V) 812, where it was placed by Congress, rendered the indictment upon

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[8]We note as well that there would be no need to resolve this issue in this context should the Court conclude that discrimination in selection of forepersons provides no basis for vacating a conviction. See page 6 note 3, *supra*, and page 9 note 7, *supra*.

which they were convicted invalid. Petitioners urge that the district court was required to hold an evidentiary hearing on their claim that the Schedule II classification should be altered. The court of appeals rejected this contention (Pet. App. A-14 to A-16), relying in part upon its prior decision in *United States* v. *Alexander*, 673 F.2d 287 (9th Cir. 1982). Because neither the DEA nor the Attorney General had any obligation to reconsider the classification established by statute, petitioners' claim is without merit, and conducting an evidentiary hearing thereon would have served no useful purpose.[9]

In 21 U.S.C. (& Supp. V) 812 Congress has established a classification of controlled substances, placing cocaine into Schedule II of that classification. Under 21 U.S.C. 811(a), the Attorney General is *authorized* to adopt regulations reclassifying any substance upon making the findings outlined in Section 812 for the particular category of controlled substances. But, as the courts of appeals have observed, there is no requirement that he do so. *United States* v. *Alexander, supra*, 673 F.2d at 289; *United States* v. *Erwin*, 602 F.2d 1183, 1185 (5th Cir. 1979), cert. denied, 444 U.S. 1071 (1980). Petitioner has cited no authority whatever in support of his contrary contention.

Under 21 U.S.C. 811(a) an interested party may petition the Attorney General to consider by rulemaking whether to reclassify a particular controlled substance. Any determination made in such a proceeding is subject to judicial review under 21 U.S.C. 877. Petitioner appears to suggest (Pet. 22) that he must also be allowed to challenge the classification

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[9]Because petitioners' attack upon the classification of cocaine is without foundation, there is no need to consider their further argument (Pet. 23-33) that the convictions must be set aside because of the invalidity of the classification which governs the penalty for the offense. See 21 U.S.C. (& Supp. V) 841-843.

of cocaine in his defense of the criminal charge lodged against him. But Congress had no obligation to provide any form of administrative reclassification remedy and judicial review; a fortiori there is no need to allow petitioners to challenge the existing classification in defense of a criminal charge. Cf. *Lewis* v. *United States*, 445 U.S. 55 (1980).

3. Petitioner Coletta contends (Pet. 33-37) that the warrantless search of his travel bag was unlawful. He argues specifically that it was neither a proper automobile search under *United States* v. *Ross*, No. 80-2209 (June 1, 1982), nor a proper search incident to arrest under *New York* v. *Belton*, 453 U.S. 454 (1981). The court of appeals held alternatively (1) that the cocaine was in plain view in Coletta's open travel bag at the time the agents seized it (Pet. App. A-17 to A-18), and (2) that the warrantless search of the travel bag was, in any event, proper under *United States* v. *Ross*, *supra*, because the agents had probable cause to stop Coletta's car and to believe that the car contained contraband (Pet. App. at A-18 to A-20). The court noted as well that probable cause extended to but was not limited to Coletta's travel bag and that the search of that bag was accordingly a proper part of the automobile search (*id.* at A-20).

Petitioner's contentions do not warrant review. First, petitioner ignores the court of appeals' alternative holding that the contents of his bag were in plain view. In light of this unchallenged holding no further justification for the "search" is needed. It is therefore unnecessary to unravel the confusion petitioner creates respecting the holdings of *New York* v. *Belton* and *United States* v. *Ross*. In any event, both of petitioner's contentions are frivolous. The very facts that he claims (Pet. 35, 37) distinguish this case from *United States* v. *Ross*, were actually present in *Ross* itself. Slip op. 2-3.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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